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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-295

JANE DOE, *et al.*,

Petitioners,

—against—

PETER BRENNAN, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETER BRENNAN, *et al.*,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on May 1, 1973.

Opinion Below

The opinion of the Court of Appeals has not yet been officially reported and is set out in the Appendix, *infra* at pp. 1a-7a. The opinion of the District Court is reported at 344 F. Supp. 964 (S.D.N.Y. 1972) and is set out in the Appendix, *infra* at pp. 8a-14a.

Jurisdiction

The judgment of the Court of Appeals was entered on May 1, 1973. On May 17, 1973, the Court of Appeals denied petitioners' motion for a rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the systematic exclusion of migrant agricultural workers from the protections of the National Labor Relations Act, the Federal Employment Insurance Tax Act, the Social Security Act, the Fair Labor Standards Act, the New York State Unemployment Insurance Act, the New York State Labor Relations Act, the New York State Minimum Wage Act and the New York State Workmen's Compensation Law raise a substantial constitutional question requiring consideration by a three judge District Court?

2. Whether the summary affirmance by this Court in *Romero* v. *Hodgson*, 403 U.S. 901 (1971) of the 2-1 decision of a three judge District Court sustaining the agricultural exemption from the Federal Unemployment Insurance Tax Act precludes further consideration by the Federal courts of contentions by migrant agricultural laborers that their systematic exclusion from virtually the entire body of ameliorative social legislation denies them equal protection of the laws?

Statement of the Case

This is an appeal from the refusal by one Court of Appeals to convene a three judge District Court to hear and determine petitioners' contention that the systematic exclusion of migrant agricultural laborers from the protection of the National Labor Relations Act;[1] the Federal Unemployment Insurance Act;[2] the Fair Labor Standards Act;[3] the Social Security Act;[4] (and other New York State analogues) and the New York State Workmen's Compen-

---

[1] The agricultural exclusion from the National Labor Relations Act is found at 29 U.S.C. 152(3). Agricultural workers are also excluded from the "Little Wagner Acts" enacted by the various states. Only in Hawaii, Michigan and the Commonwealth of Puerto Rico do agricultural employees possess meaningful collective bargaining rights. See, *Local Union No. 300, Amalgamated Meat Cutters* v. *McCulloch*, 428 F.2d 396 (5th Cir. 1970).

[2] The agricultural exclusion from the Federal Unemployment Insurance Tax Act occurs at 26 U.S.C. 33306 (c)(1). Only Hawaii has provided for unemployment compensation for agricultural workers.

[3] Agricultural workers were totally excluded from the Fair Labor Standards Act until 1966, when the Act was amended to cover approximately 5 percent of the agricultural labor force. 29 U.S.C. 203(f), 206(a)(5) and 213(a)(6). See, generally, 1969 Report of the Senate Subcommittee on Migratory Labor (Rep't No. 91-83, 91st Cong. First Session).

[4] The Social Security Act does not explicitly exclude farmworkers. However, a discriminatory qualification requirement, applicable only to farmworkers, effectively bars the vast bulk of the migrant work force. Title 42 U.S.C. 409(h)(2) requires that, in order to qualify for coverage, an agricultural worker must earn more than $150 in cash from a single employer during a calendar year. Since the nature of migrancy compels a rapid employer turnover, payments from a single employer to a migrant rarely exceed $150.

sation Law[5] denies migrant agricultural laborers the equal protection of the laws, and imposes unconstitutional impediments upon their freedom to associate and their right to travel.

Although both the District Court and the Court of Appeals expressed sympathy with the legal plight of migrant agricultural laborers and acknowledged that their legal claims were far from frivolous[6] each felt itself bound to deny petitioners' application for a three judge Court and to dismiss petitioners' complaint solely on the authority of this Court's summary affirmance in *Romero* v. *Hodgson,* 403 U.S. 901 (1971) of a 2-1 decision by a three judge Court in the Northern District of California sustaining the agricultural exemption from the Federal Unemployment Insurance Act. 319 F. Supp. 1201 (N.D. Cal. 1970).

Thus, the basic issue raised by this appeal is not the constitutionality of the systematic exclusion of migrant agricultural laborers from virtually all 20th Century social legislation, but rather whether this Court, by summarily affirming the decision of one divided three judge Court, involving an agricultural exemption from a single statute,

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[5] There currently exists a national Workmen's Compensation plan only for the longshore industry. Migrants are totally excluded from the bulk of state Workmen's Compensation laws. New York provides severely limited coverage. Workmen's Compensation Law, §201(6)(A).

[6] Both the District Court and the Court of Appeals indicated that each believed that petitioners' complaint raised serious constitutional issues. Indeed, the Court of Appeals stated:

> "Were we writing on a clean slate, we would take very seriously the assertion that on these facts the statutory exclusions cannot be sustained. But given *Romero,* the slate is not clean; plaintiffs must obtain any further writings on it in this case from the Supreme Court. Appendix, p. 7a.

has absolutely disabled the Federal judiciary from granting a hearing to any migrant challenging his or her exclusion from the entire body of social welfare legislation which shields the remainder of the American labor force from economic catastrophe and exploitation.

Petitioners are nine migrant agricultural laborers[7] whose lives continue to be blighted as a direct consequence of their systematic exclusion from the ameliorative social legislation at issue herein. With no collective bargaining rights, no unemployment insurance, diluted minimum wage-maximum hour protection, limited child labor protection, no Social Security coverage and no workmen's compensation protection, petitioners exist in a generational cycle of poverty and despair, causally related to their exclusion from the statutes at issue herein. Moreover, as a direct consequence of their powerlessness, petitioners are disabled from seeking redress through traditional political channels. It is an unfortunate reality that the political constituency of our migrant agricultural poor is non-existent. Only through the immutable guaranty of the Equal Protection clause can they hope to remedy their systematic exclusion from the mainstream of American life.

Petitioners are members of the Eastern migrant stream which flows from northern Florida, Louisiana and Arkansas, through Virginia and Maryland into New York,

[7] In order to shield petitioners from the very real danger of economic and physical reprisals, counsel has sought to prosecute this action by substituting pseudonyms for petitioners' actual names. At Judge Frankel's suggestion, a sealed version of the complaint was delivered to him in which the actual identities of the petitioners are recited. Consideration of the further disclosure of the real identities of petitioners has been deferred pending the outcome of the appellate process.

New Jersey and even Maine. As are virtually all migrants in the Eastern stream, petitioners are members of racial minorities. As the harvest cycle passes from citrus (Northern Florida) to apples (Virginia) to potatoes, cherries, apples, strawberries and truck farming (New York, New Jersey), petitioners travel from migrant camp to migrant camp to offer their labor to waiting farmers. Petitioners travel in groups of between 8-30, called crews. Each crew is led by a crew chief who, by dint of resourcefulness and sheer physical strength, assembles his crew and negotiates with growers to provide harvest labor at an agreed price. The crew chief transports his crew to the harvest area and houses them in a migrant labor camp owned by the farmer, but operated by the crew chief. Once established in a migrant camp, a worker is expected to eat his meals in a common mess hall in return for the payment of a weekly sum to his crew chief. In addition, each migrant is expected to pay a weekly rental for his or her dormitory space.

Each morning, the crew chief tranports the migrants to the harvest site to await the farmer's instructions. Once at the site, migrants are paid only for time actually worked, or on a piece work basis. Thus, when weather, machinery breakdown, crop failure or economic conditions make it impossible to continue the harvest, petitioners are simply not paid. During such slack periods (known as "down time"), fixed expenses for rent and food continue, creating a debt to the crew chief from which few migrants escape.

Despite lives of back-breaking labor, no petitioner has ever earned more than $3,000 in any year. Petitioners work approximately 20 hours of billable harvest time in an aver-

age week. Each owes fixed weekly expenses of approximately $20 for food and lodging and between $5-$10 additional expenses for such "luxuries" as canned soda with meals, the right to watch the crew chief's television set and a pint of wine. Thus, their weekly take-home pay in an average week at premium rates rarely exceeds ten dollars.

So brutal a system of wage peonage simply could not exist but for petitioners' systematic exclusion from the social welfare legislation virtually all Americans take for granted as their birthright. Indeed, it is a disturbing, but nonetheless accurate, observation that the squalor and degradation of a migrant's life is directly attributable to a conscious societal decision, reflected in the systematic exclusions at issue herein, to omit agricultural laborers from the economic model which characterizes the remainder of 20th Century America, and to abandon them to the vagaries of an unregulated employer-employee relationship reminiscent of the worst abuses of the Industrial Revolution. Whether such a conscious societal decision inevitably conflicts with the values and guarantees of the Equal Protection clause is what this case is all about.

REASONS FOR GRANTING THE WRIT

1.

Certiorari should be granted because the decision of the Court below, declining to convene a three-judge Court, is in conflict with the decisions of the Ninth Circuit Court of Appeals in *Dillenburg* v. *Kramer*, 469 F.2d 1222 (1972), the Supreme Court of California in *Serrano* v. *Priest*, 487 P.2d 1241 (1971) and this Court in *Gibson* v. *Berryhill*, —— U.S. ——, 41 U.S.L.W. 4576 (May 7, 1973).

The Court below ruled that the entry of an order of summary affirmance by this Court in *Romero* v. *Hodgson*, 403 U.S. 901 (1971), absolutely precluded the lower federal judiciary from entertaining the contentions of migrant agricultural workers that their systematic exclusion from virtually all ameliorative social legislation denies them the Equal Protection of the laws. In ascribing so drastic a set of legal consequences to the order of summary affirmance in *Romero*, the Second Circuit was in conscious and explicit disagreement with the Ninth Circuit which has ruled in *Dillenburg* v. *Kramer*, 469 F.2d 1222 (1972) that the summary affirmance by this Court of a case within its "obligatory appellate jurisdiction has very little precedential significance." 469 F.2d at 1225. See also, *Serrano* v. *Priest*, 487 P.2d 1241, 1264 n. 35 (1971).

As Mr. Justice White noted for this Court in *Gibson* v. *Berryhill*, —— U.S. ——, 41 U.S.L.W. 4576, 4580 (May 7, 1973), summary affirmances by this Court are frequently "somewhat opaque." Yet the Court below dismissed a constitutional claim, which it suggested was otherwise sub-

stantial, with no more explicit guidance from this Court than an "opaque" order of summary affirmance in *Romero* v. *Hodgson, supra.* Such orders of summary affirmance cannot command such drastic results.

Since this Court enters literally hundreds of orders of summary affirmance each term, it should grant certiorari in order to resolve the conflict between the decision of the Court below and the decision of the Ninth Circuit in *Dillenburg* v. *Kramer, supra,* and to provide guidance to the lower courts on a recurring practical problem in the administration of justice.

2.

Certiorari should be granted because the decision of the Court below ascribed overbroad significance to the entry by this Court of an order of summary affirmance.

Since the enactment of the Judges' Bill in 1925, the vast bulk of this Court's docket has been regulated by the discretionary grant or denial of certiorari. Thus, the most recent statistics indicate that, of the 4,371 cases filed with this Court during the 1971 Term, 91.7 percent were certiorari cases, while only 8.3 percent fell within the Court's obligatory appeal jurisdiction. *Federal Judicial Center Report of the Study Group on the Caseload of the Supreme Court,* A. 11 (December 1972) [hereafter cited as *Study Group*]. Moreover, since 1927, this Court has required litigants invoking its appellate jurisdiction to file a Jurisdictional Statement, similar to a Petition for Certiorari, requesting plenary consideration of an appeal. The vast bulk of such appeals are disposed of in summary fashion on the basis of the Jurisdictional Statement without plenary consideration of their merits. Thus, in the 1971 Term of the

Court, 82 percent of the Court's appellate docket was disposed of summarily. *Study Group*, A. 10.

While this Court's summary disposition of an application for certiorari is universally recognized as having no *stare decisis* impact, considerable controversy has arisen over the *stare decisis* impact of the summary disposition of an appeal. Compare, *Dillenburg* v. *Kramer*, 409 F.2d 1222 (9th Cir. 1972) and *Serrano* v. *Priest*, 5 Cal. 2d 584, 615-618, 487 P.2d 1241, 1263-1264 (1971), with the decision of the court below.

As the *Study Group on the Caseload of the Supreme* Court has noted:

> "In theory, in passing upon a jurisdictional statement on appeal, the Court addresses itself to the substantive issues presented and not merely to whether the case is worthy of further review. But, in view of the great number of cases now reaching the Court, and the little time available for each, the disposition of most appeals on a summary basis is not a satisfactory equivalent for the judgment on the merits it is supposed to be. *Study Group*, p. 26.

The apparent functional similarity between the Court's certiorari practice and its summary appeal practice has rendered it increasingly difficult to justify ascribing dramatic precedential significance to one set of determinations, while recognizing that the functionally similar certiorari determination is without precedential effect. Willey, *Jurisdictional Statement on Appeals to U.S. Supreme Court*, 31 A.B.A.J. 239 (1945).

When Professor Hart published his critique of the Supreme Court in 1959,[8] he expressed dismay at the physical inability of the Court to devote sufficient consideration to the summary disposition of its appellate docket.[9] In the years which followed, the time pressures on the Court have increased tremendously. What seemed to Professor Hart an insuperable burden in 1958, the disposition of 1,819 new cases, has risen to 3,651 new cases during the 1971 Term of the Court. Indeed, since *The Time Chart of the Justices* was published, the size of the Supreme Court's docket has more than doubled.

Thus, regardless of the Court's undoubted desire to respect the Congressional delineation of its obligatory jurisdiction, the sheer weight of the Court's burgeoning caseload reduces to the merest fiction the notion that a summary adjudication is the precedential equivalent of a plenary determination on the merits. *Study Group, supra,* at pp. 29-30. Of the 253 appeals filed during the 1971 Term, 209 were summarily adjudicated. *Study Group,* p. A. 10. See, generally, Stern & Gressman, *Supreme Court Practice* (4th Ed. 1969) at 194. Given the reality of the process by which summary adjudication is determined, Professor

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[8] Hart, *The Time Chart of the Justices,* 73 Harv. L. Rev. 84 (1959).

[9] As Professor Hart noted a decade ago, when the docket pressures on the Court were substantially less critical:

> "The figures, of course, cannot shake the authority of the formal doctrine that summary adjudications must be respected as precedents. But they do raise a question about the degree of intellectual respect which is due these determinations. Hart, *The Time Chart of the Justices, supra,* at 95.

Currie's observation a decade ago[10] is now, more than ever, an accurate description of a reality imposed by the enormous difficulty in coping with an ever expanding docket. See also, Frankfurter and Landis, *The Business of the Supreme Court at October Term, 1929,* 44 Harv. L. Rev. 1, 14 (1930).

Accordingly, it was improper for the Court below to have ascribed such dramatic precedential significance to this Court's entry of a single order of summary affirmance in a tangentially related case.

3.

Certiorari should be granted because the decision of the Court below misapplied the order of summary affirmance entered by this Court in *Romero* v. *Hodgson*, 403 U.S. 901 (1971).

In *Gibson* v. *Berryhill, supra,* Mr. Justice White noted that the "opaque" nature of an order of summary affirmance dictated caution in its use as a precedent. Unfortunately, the Court below utilized the summary affirmance in *Romero* as a precedent for issues which were clearly not before this Court in *Romero.* Thus, whatever the *stare decisis* effect of *Romero,* it cannot foreclose the presentation of claims not fairly within its ambit.

First, the instant case challenges the systematic and pervasive exclusion of migrant agricultural workers from the five statutes which form the foundation for virtually all

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[10] "It has often been observed that the dismissal of an appeal, technically an adjudication on the merits, is in practice often the substantial equivalent of a denial of certiorari." D. Currie, *The Three Judge District Court in Constitutional Litigation,* 32 U. of Chi. L. Rev. 1, 74 fn. 365 (1964).

20th century American employer-employee relationships. Thus, the cumulative impact, both legally and factually, of a conscious societal decision to exclude a discrete segment of the labor force (consisting of members of racial minorities) from critically important ameliorative statutes is crucial to the theory of petitioners' case. In effect, petitioners claim a pattern or practice of unequal treatment cutting across the entire spectrum of American social legislation.

Romero, on the other hand, challenged merely the existence of a single agricultural exclusion from one Federal statute. At no time during the *Romero* litigation was any attempt made to relate the single statute at issue therein to the systematic exclusion of migrant agricultural laborers from the broad range of ameliorative social legislation.

Moreover, *Romero* was litigated on an assumption by all parties that the appropriate standard of judicial review was the highly permissive test articulated by this Court in *Williamson* v. *Lee Optical Co.,* 348 U.S. 483 (1955). While such a permissive standard may have been appropriate in testing a narrow exclusion from a single statute in 1970, it is at least a substantial question whether the more stringent tests articulated by this Court in "fundamental rights" cases, or whether the newly enunciated revitalized rational-relationship test, should not be applied in adjudicating petitioners' claim of a "pattern or practice" of systematic discrimination against agricultural laborers.

Thus, whatever its *stare decisis* impact, the summary affirmance in *Romero* is simply not dispositive of the theory of this case. It is a wholly unwarranted ascription of meaning to read *Romero* as foreclosing all claims which, although not actually advanced, could have been advanced in

that case. In sum, there are obvious differences in theory and presentation between *Romero* and the case at bar. Given the inherent difficulty in distilling any meaning whatever from an order of summary affirmance, such difficulty is exacerbated when an attempt is made to dispose of one case by applying to it the summary affirmance of another, in a situation where the two cases differ in scope and theory. The existence of such dramatic differences of scope and theory between *Romero* and the instant matter, compels the conclusion that petitioners here have been deprived of an opportunity to proceed with their claim and to build a factual record as a result of the misapplication of the summary affirmance in *Romero*.

4.

Certiorari should be granted because the systematic exclusion of migrant agricultural workers from ameliorative social legislation raises the most serious constitutional issues which should be explored by the lower courts.

It is generally conceded that but for the misapplication of the summary affirmance in *Romero*, petitioners presented a serious constitutional question to the lower courts which would undoubtedly have warranted the convocation of a three judge court. *Goosby* v. *Osser*, 409 U.S. 512 (1973); *Local Union No. 300, Amalgamated Meat Cutters* v. *McCulloch*, 428 F.2d 396 (5th Cir. 1970).

Although the equal protection doctrine is currently in a state of no little uncertainty,[11] it is clear that petitioners'

[11] See generally, Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine in a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972); *Frontiero* v. *Richardson*, —— U.S. ——, 41 U.S.L.W. 4609 (May 14,

contentions raise serious questions which should entitle them to an opportunity to build a factual record before a trial court in order to demonstrate the unconstitutionality of the exclusions in question. Surely, *Romero* does not deprive petitioners of an opportunity to rebut and to test by cross-examination the purported legitimate bases for the exclusion of migrants from 20th century social legislation. Petitioners seek nothing more than a day in court and the courts below erred in refusing to allow them an opportunity to prove their case.[12]

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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1973); *United States Department of Agriculture* v. *Moreno*, —— U.S. ——, 41 U.S.L.W. 5105 (June 25, 1973).

[12] The refusal, on the basis of *Romero*, to permit petitioners to build a factual record is particularly distressing since *Romero* was submitted on a scant two-page stipulation of facts which does not even begin to reflect the factual basis of petitioners' case.

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 606—September Term, 1972.

(Argued March 22, 1973 Decided May 1, 1973.)

Docket No. 72-1744

JANE DOE; JOHN DOE; RICHARD ROE; JAMES POE; JAMES DOE; JAMES ROE; JOHN ROE; RICHARD DOE; JANE ROE, nine migrant agricultural workers, on behalf of each and on behalf of all others similarly situated; namely those persons engaged in migrant agricultural labor in Ulster County, New York,

Plaintiffs-Appellants,

—against—

JAMES D. HODGSON, Secretary of Labor; JOHN E. WALTERS, Commissioner of Internal Revenue; LOUIS LEVINE, Industrial Commissioner of the State of New York; EDWARD B. MILLER, Chairman, National Labor Relations Board; HORACE MENASCO, Administrator, Wage and Hour Division, United States Department of Labor; GEORGE OSTROW, Director, Division of Labor Standards, New York State Department of Labor; ROBERT M. BALL, Commissioner of Social Security; SOLOMON SENIOR, Chairman, New York State Workmen's Compensation Board,

Defendants-Appellees.

Before:

SMITH, FEINBERG and MANSFIELD,
Circuit Judges.

Appeal from order of United States District Court for the Southern District of New York, Marvin E. Frankel, *J.*, dismissing complaint for want of substantial federal question.

Affirmed.

BURT NEUBORNE, New York, N.Y. (New York Civil Liberties Union; Norman Dorsen, New York University Law School, on the brief), *for Plaintiffs-Appellants.*

T. GORMAN REILLY, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York; Taggart D. Adams, Assistant United States Attorney, on the brief), *for federal Defendants-Appellees.*

STEPHEN P. SELIGMAN, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York; Samuel A. Hirshowitz, First Assistant Attorney General; Irving L. Rollings, Assistant Attorney General, on the brief), *for New York State Defendants-Appellees.*

FEINBERG, *Circuit Judge:*

Nine migrant agricultural workers, protected by pseudonyms, challenge the constitutionality of provisions in

various federal and state statutes which operate to exclude them and others so situated from the beneficial provisions of social legislation in such areas as unemployment compensation, minimum hours and wages, social security and workmen's compensation.[1] Plaintiffs' complaint sought the convening of a three-judge court, a declaratory judgment, and "appropriate equitable relief in the nature of injunction or mandamus enforcing plaintiffs' rights and defendants' responsibilities under the First, Fifth, Thirteenth and Fourteenth Amendments. . . . " The United States District Court for the Southern District of New York, Marvin E. Frankel, *J.*, refused to convene a three-judge court and dismissed the complaint, 344 F. Supp. 964 (1972), because of the controlling effect of *Romero* v. *Hodgson,* 403 U.S. 901 (1971), summarily affirming 319 F. Supp. 1201 (N.D. Cal. 1970) (per curiam). Although we believe that as an original matter plaintiffs' basic equal protection claim merits the closest judicial attention, we conclude that under applicable precedent we should not now engage in that pursuit. Because the plight of migrant workers as portrayed in plaintiffs' complaint is so unfortunate,[2] we reach

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[1] The complaint challenges the Federal Unemployment Tax Act, 26 U.S.C. § 3306(e)(1), (k); the Fair Labor Standards Act, 29 U.S.C. § 206(a)(5); the Social Security Act, 42 U.S.C. § 409 (h)(2); the New York Unemployment Insurance Act, N.Y. Labor Law § 511(6)(a) (McKinney 1965); the New York Minimum Wage Act, id. § 651(5)(b), id. §§ 671(6), 673 (1972-73 Supp.); and the New York Workmen's Compensation Law, N.Y. Wkmn's Comp. Law § 201(6)(A) (McKinney 1965). Plaintiffs also attack exclusion from and misapplication of the National Labor Relations Act, 29 U.S.C. §§ 152(3), 158(b)(4).

In their briefs in this court, plaintiffs refer to only one state statute, the workmen's compensation law. In view of our disposition, we think it unnecessary to resolve any inconsistency.

[2] E.g., none of the plaintiffs earns more than $3,000 per year; they are randomly subject to enforced periods of unemployment ranging up to weeks without any compensation, during which they

this conclusion, and consequently affirm, with considerable hesitation.[3]

In *Romero* v. *Hodgson, supra,* a divided three-judge court sustained the Federal Unemployment Tax Act, one of the statutes under attack here, against an equal protection challenge. Faced with the argument that the exclusion of agricultural labor from the coverage of the statute was no longer justifiable on the grounds originally relied upon by the Supreme Court in 1937,[4] the majority nevertheless sustained the exclusion, 319 F. Supp. at 1203, because it could

> be seen as an indirect subsidy of a "beneficent enterprise", or as an effort to save the compensation fund from the drain which would result from the inclusion of another large "deficit industry", or even as a necessary political compromise without which it would have been impossible to inaugurate a most important reform in American institutions.

Judge Zirpoli filed a strong dissent, arguing that the exclusion was now factually unsupportable and therefore ir-

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are "reduced to utter destitution"; although subjected to serious occupational hazards posed by mechanized equipment and noxious pesticides, plaintiffs are without the disability protections of workmen's compensation laws.

[3] Because we agree with Judge Frankel's resolution, we need not consider alternative objections to relief, pressed by appellees and alluded to by the district court, i.e., whether plaintiffs' prayer for injunctive relief is sufficiently concrete to merit three-judge consideration, and whether plaintiffs seek to enjoin assessment or collection of federal taxes, as prohibited by 26 U.S.C. § 7421(a). See 344 F. Supp. 967 & n. 3.

[4] *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 512-13 (1937).

rational. The dissent pointed out that while administrative hardship for small farmers might have justified the original exemption of agricultural workers, "in 1964, 89 per cent of all hired farm workers . . . were employed by large commercial agricultural corporations"; in addition, unemployment compensation has been extended to other industries which "fiscally speaking, are much greater drains on the compensation fund," thus making "untenable the . . . argument that agriculture has been excluded as a 'deficit' industry" (footnote omitted); and, finally, the "Unemployment Tax Act is not an industrial subsidy; it is social welfare legislation." Id. at 1205. With the issues thus clearly spelled out, on direct appeal to the Supreme Court the judgement of the district court was summarily affirmed.[5]

Plaintiffs argue that such a disposition should not be controlling in this case. They point to the heavy Supreme Court caseload and the observations of Supreme Court scholars (including the recent report of a study group chaired by Professor Paul A. Freund) to the effect that summary disposition of cases on the appellate docket "is not a satisfactory equivilent for the judgment on the merits it is supposed to be."[6] Plaintiffs thus contend that summary affirmance is entitled to no more—or little more—precedential weight than is the denial of a petition for a writ of certiorari. However, we have ruled to the contrary. See *United States ex rel. Epton* v. *Nenna*, 446 F.2d 363, 366, cert. denied, 404 U.S. 948 (1971); *Heaney*

[5] Mr. Justice Douglas would have noted probable jurisdiction.

[6] Report of the Study Group on the Caseload of the Supreme Court 26 (1972); see authorities cited in *United States ex rel. Epton* v. *Nenna*, 318 F. Supp. 899, 906 n.8 (S.D.N.Y. 1970).

v. *Allen*, 425 F.2d 869, 870-71 (1970); *Port Authority Bondholders Protective Committee* v. *Port of New York Authority*, 387 F.2d 259, 262-63 n.3 (1967).[7] We are aware that the Ninth Circuit has stated that a summary affirmance by the Supreme Court of a case within its "obligatory appellate jurisdiction has very little precedential significance." See *Dillenburg* v. *Kramer*, 469 F.2d 1222, 1225 (1972).[8] For now, however, we continue to believe that we are bound by the Supreme Court's summary affirmances "until such time as the Court informs us that we are not." *United States ex rel. Fein* v. *Deegan*, 410 F.2d 13, 22 (2d Cir.), cert. denied, 395 U.S. 935 (1969).

Plaintiffs also argue that even if the affirmance in *Romero* is entitled to precedential weight, differences between that case and this are so significant that the affirmance in the former cannot foreclose the claims made here. *Romero*, they say, challenged only one statute, while this case attacks many in an effort to establish a "pattern or practice" of systematic exclusion of migrants from curative social legislation. Second, plaintiffs contend that they can here demonstrate a "causal relationship" between the exclusions and deprivation of fundamental rights, e.g., association, speech, right to travel, and that strict equal protection review is thus appropriate. Finally, plaintiffs urge that *Romero* was decided prior to cases from the last Term in

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[7] Although these cases considered the stare decisis effect of a Supreme Court *dismissal*, for want of a substantial federal question, of an appeal from a state court, their reasoning applies with at least as much force to summary affirmances on direct appeals from three-judge courts. This difference in disposition is without significance, explained only by history. R. Stern & E. Gressman, Supreme Court Practice 233 (4th ed. 1969).

[8] Accord, *Serrano* v. *Priest*, 487 P.2d 1241, 1264 & n.35 (1971) (dictum).

which the Supreme Court invested "rational basis" review under the equal protection clause with considerably more bite and realistic application than had previously been thought appropriate.

These arguments, particularly the last, are by no means frivolous. However, as to the first two, we cannot in good conscience hold that either the presence of four federal statutes under attack instead of one or the bare assertion that "fundamental rights" of migrants are jeopardized by the statutory exclusions justifies our disregarding *Romero*. As to the last argument, we have ourselves noted the apparent, post-*Romero*, trend toward a less deferential application of the "rational basis" standard of equal protection,[9] although not without some disagreement. See *Boraas* v. *Village of Belle Terre*, slip op. 2697 (2d Cir. April 5, 1973) (Timbers, J., dissenting from 4-4 denial of en banc reconsideration). Were we writing on a clean slate, we would take very seriously the assertion that on these facts the statutory exclusions cannot be sustained. But given *Romero*, the slate is not clean; plaintiffs must obtain any further writings on it in this case from the Supreme Court.

Judgment affirmed.

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[9] In particular, while the three-judge district court *Romero* majority noted "something rigid" about the choice between the strict standard of review and one "as deferential as any known to the law," 319 F. Supp. at 1202, it is precisely this sharp dichotomy which we have found considerably narrowed. See, e.g., *Boraas* v. *Village of Belle Terre*, slip op. 1995, 2008-09 (2d Cir. Feb. 27, 1973); *Green* v. *Waterford Board of Education*, 473 F.2d 629, 633-34 (2d Cir. 1973); *City of New York* v. *Richardson*, slip op. 1681, 1694-95 (2d Cir. Jan. 26, 1973); *Aguayo* v. *Richardson*, slip op. 1555, 1587-90 (2d Cir. Jan. 18, 1973).

Opinion of the United States District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 1816

JANE DOE, *et al.*,

Plaintiffs,

—against—

JAMES D. HODGSON, Secretary of Labor, *et al.*,

Defendants.

Appearances:

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New York, N.Y.
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FRANKEL, *D.J.*

The nine plaintiffs are agricultural laborers. Using fictitious names, they have brought the somewhat unusual form of action which is now before the court on their motion for the convening of a three-judge court. The "omnibus complaint," as the United States Attorney suitably styles it, names as defendants five federal officials—the Secretary of Labor, the Commissioner of Internal Revenue, the Chairman of the N.L.R.B., the Administrator of the Labor Department's Wage and Hour Division and the Commissioner of Social Security—and three New York State officials—the Industrial Commissioner, the Director of the Division of Labor Standards, New York State Department of Labor, and the Chairman of the Workmen's Compensation Board. The impersonal complaint against these defendants is that the statutes they administer contain exclusions withholding benefits and protections from agricultural workers. The array of statutes thus assailed are the Federal Unemployment Tax Act, 26 U.S.C. §3306 (c)(1)(K), the Fair Labor Standards Act, 29 U.S.C. §206(a)(5), the Social Security Act, 42 U.S.C. §409(h)(2), the New York Unemployment Insurance Act (Labor Law §511(6)(a)), the New York Minimum Wage Act (*id.* §§651(5)(b), 671(6) and 673), and the New York Workmen's Compensation Law, §201(6)(A). Plaintiffs also protest "the threatened mis-application of the National Labor Relations Act (29 U.S.C. §158(b)(4)) * * *." Invoking the jurisdiction of this court under 28 U.S.C. §§1331, 1343(3) and 1361, together with 5 U.S.C. §1009, they charge that the target statutes, individually and in their "cumulative effect," offend against the First, Fifth, Thirteenth and Fourteenth Amendments.

Plaintiffs charge that the questioned exclusions effect arbitrary and unreasonable discriminations, denying due process and equal protection; that they accomplish "an invidious discrimination between classes of laborers on racial grounds" (the agricultural labor force, their brief elaborates, having become "overwhelmingly black and chicano"), contrary to the Fifth and Fourteenth Amendments; that the overall impact of the "systematic exclusion" they suffer creates "a system of employment so blatantly violative of fundamental rights as to render the continuation of the current operation of the migrant agricultural labor system imposed peonage in violation of the Fifth, Thirteenth and Fourteenth Amendments * * *." (Complaint par. 36.) They seek the convening of a three-judge court to "hear and determine" their charges of unconstitutionality, to grant a declaratory judgment, and, finally, under their eighth prayer, to "grant appropriate equitable relief in the nature of injunction or mandamus enforcing plaintiffs' rights and defendants' responsibilties under the First, Fifth, Thirteenth and Fourteenth Amendments * * *."[1]

As to the immediate question of a three-judge court, defendants make a powerful argument that plaintiffs have failed to plead for such relief as to require that cumbersome and expensive kind of tribunal. See *Utica Mutual Insurance Co.* v. *Vincent*, 375 F.2d 129, 131 (2d Cir.) cert. denied, 389 U.S. 839 (1967). With respect to both the state and federal statutes called into question, three judges must convene only if the relief sought is "[a]n interlocutory or permanent injunction restraining the enforcement, operation or execution" of the enactment.[2] For the grant-

[1] The ninth and last prayer is for the usual "other and further relief * * *."

[2] 28 U.S.C. §§2281, 2282.

ing or denial of merely declaratory relief, a single district judge is sufficient. *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 152-155 (1963); and see *Mitchell* v. *Donovan,* 398 U.S. 427, 430-431 (1970). Except for the vague penultimate prayer for "appropriate equitable relief in the nature of injunction or mandamus," plaintiffs nowhere indicate what, if anything, they actually want "restrained." Their difficulty is evident, of course. Suffering from deprivations rather than impositions, their injuries are from benefits withheld rather than positive penalties or affronts. They do not seek the cessation of anything, except in the roundabout sense of some double negatives. They complain of injuries correctible ultimately by legislative enlargements, not by prohibitions against the enforcement of existing law. This characterization of plaintiffs' complaint does not serve, and is not meant, to minimize their plight or their grievances. Nor is it offered in entire ignorance of our law's general tendency to restrict old notions about "negative" and "affirmative" actions by government. See *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 143 (1939). The technical point remains something of consequence, however, when we deal with a provision for three-judge courts, which is not "a measure of broad social policy to be construed with great liberality, but * * * an enactment technical in the strict sense of the term and to be applied as such." *Phillips* v. *United States,* 312 U.S. 246, 251 (1941). And this is especially so when, as now, the Government, State or Federal, for the protection of which the three-judge device exists, comes before us through its responsible officers and pleads to be spared the protection.

Although this position of the defendants is a substantial one, strengthened perhaps by specific reference to some

of the varying statutes plaintiffs join as objects of this action,[3] the court will assume that the prayer for relief, if that were the sole concern, would be sufficient to call for a three-judge court.

This leaves, however, the contention that plaintiffs' case is foreclosed by controlling precedent, and that the single judge should therefore dismiss the complaint for that reason. *Ex parte Poresky,* 290 U.S. 30 (1933); *Utica Mutual Insurance Co.* v. *Vincent, supra,* 375 F.2d at 130. The court has concluded that the defendants must prevail on this ground.

However it might be viewed as a legislative proposition, and however it might fare were it a new question for the courts, plaintiffs' complaint is defeated by the decision just a year ago in *Romero* v. *Hodgson,* 403 U.S. 901, summarily affirming 319 F.Supp. 1201 (N.D. Calif. 1970).[4] While the decision thus sustained was rendered by a divided three-judge court, and while one Justice noted his dissent from the affirmance, it seems clear that the Supreme Court's ruling concludes the merits of the case plaintiffs have brought here.[5] Plaintiffs urge several distinctions, but they are

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[3] Insofar as plaintiffs might be thought to be seeking injunctions against federal tax collections or assessments, they would face the broad prohibition against such relief in 26 U.S.C. §7421(a). The point, not in itself a major one, suggests some of the multifarious difficulties likely to arise in a lawsuit that challenges so wide an array of enactments. The decision reached today makes it unnecessary to pursue such problems.

[4] Plaintiffs rely upon *Local Union No. 300* v. *McCulloch,* 428 F.2d 396 (5th Cir. 1970), holding the validity of the National Labor Relations Act exclusion of farm workers a question substantial enough for three judges. But *Romero,* decided by the Supreme Court a year later, made that decision obsolete.

[5] That the decision is to be viewed as being "on the merits," see, e.g., *United States ex rel. Epton* v. *Nenna,* 446 F.2d 363, 366 (2d Cir.), cert. denied, 404 U.S. 948 (1971).

not, singly or together, persuasive. The *Romero* case, plaintiffs point out, concerned only unemployment compensation, while the pervasive disadvantages shown by the statutes now attacked present a more vivid, dramatic and profound case of disadvantage for agricultural workers. This would mean, for example, that *Romero* itself should be overruled when the same tax scheme is tied for litigation purposes to other measures, enacted at other times and serving other ends. The argument is novel and interesting. But the court perceives in it no sound basis for reconsidering at this level a recent decision of the Supreme Court following the thus far settled course of judging statutes singly, with an eye to their distinct rationales and asserted justifications, for purposes of constitutional tests.

Plaintiffs also argue that *Romero* did not deal with the argument, now made, that the agricultural exclusion effects a forbidden constriction of the right to travel. Apart from the fact that the new argument does not appear to be a powerful one, the tendering of such additional points does not warrant reexamination by a district court of a precedent that is squarely controlling in terms of its result.

Plaintiffs are on still weaker ground when they urge that *Romero* overlooked a point now stressed—that agricultural workers are today "overwhelmingly black and chicano," so that the exclusions in question impose "substantial disabilities upon plaintiffs along discrete and identifiable racial lines." Actually, the plaintiffs in *Romero* argued repeatedly to the Supreme Court that the exclusion "discriminates, albeit inadvertently, against Mexican-Americans who constitute the major California ethnic group employed in agriculture and minority groups who constitute the major ethnic and racial groups employed in agri-

culture throughout the United States."[6] There is, then, no valid occasion for this court to consider whether such "inadvertent" impacts, where it seems plain that the underlying legislative "judgments are rational, and not invidious," and are grounded in views "lacking in racial motivation," *Jefferson* v. *Hackney*, —— U.S. ——, —— (1972), could require a a result different from that in *Romero*. Cf. *Braunfeld* v. *Brown*, 366 U.S. 599, 607 (1961).

The court is persuaded, in sum, that plaintiffs' federal claims are in the pertinent sense unsubstantial. The motion for a three-judge court is denied. The complaint is dismissed.[7]

It is so ordered.

Dated: New York, New York
June 7, 1972

(Illegible)
U.S.D.J.

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[6] Jurisdictional Statement, O.T. 1970, Misc. No. 6847, p. 8; see also *id.* at 11.

[7] As the sole ground he briefs for dismissal, the State Attorney General argues that a suit may not proceed on behalf of unidentified—i.e., fictitiously named—plaintiffs, citing *Roe* v. *State of New York*, 49 F.R.D. 279 (S.D.N.Y. 1970). The argument, in which the federal defendants join, has weight, but it is not reached as a ground of decision herein. At the court's suggestion, plaintiffs' counsel has filed a sealed statement identifying the plaintiffs. If and when the question should become a live one, the court can consider a direction that the identities be disclosed or, if that is resisted, dismissal be confronted again as an arguable alternative. The problem will arise, of course, only if and when the ruling now announced is reversed. Balancing the interests, including the plausible fear of plaintiffs that they risk reprisals, the postponement thus effected seems a fair and sufficient expedient.

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit held at the United States Court House, in the City of New York on the seventeenth day of May one thousand nine hundred and seventy-three.

Present:

HON. J. JOSEPH SMITH,
HON. WILFRED FEINBERG,
HON. WALTER R. MANSFIELD,
Circuit Judges.

Docket No. 72-1744

JANE DOE, JOHN DOE, RICHARD ROE, JAMES POE, JAMES DOE, JAMES ROE, JOHN ROE, RICHARD DOE, JANE ROE, in immigrant agricultural workers, on behalf of each and on behalf of all others similarly situated, namely those persons engaged in migrant agricultural labor in Ulster County, New York, *Plaintiffs-Appellants,*

v.

JAMES D. HODGSON, Secretary of Labor, JOHN E. WALTERS, Commissioner of Internal Revenue, LOUIS LEVINE, Industrial Commissioner of the State of New York, EDWARD B. MILLER, Chairman, National Labor Relations Board, HORACE MENASCO, Administrator, Wage and Hour Division, United States Department of Labor, GEORGE OSTROW, Director, Division of Labor Standards, New York State Department of Labor, ROBERT M. BALL, Commissioner of Social Security, SOLOMON SENIOR, Chairman, New York State Workmen's Compensation Board, *Defendants-Appellees.*

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

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No. 73-295

In the Supreme Court of the United States

OCTOBER TERM, 1973

JANE DOE, ET AL., PETITIONERS

v.

PETER BRENNAN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-295

JANE DOE, ET AL., PETITIONERS

v.

PETER BRENNAN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 8a-14a) is reported at 344 F. Supp. 964. The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 478 F. 2d 537.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1973, and a petition for rehearing was denied on May 17, 1973 (Pet. App. 15a). The petition for a writ of certiorari was filed on August 14, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly refused to convene a three-judge court to hear petitioners' contentions that the exclusion of some or all agricultural laborers from full coverage under the Federal Unemployment Tax Act, the Federal Insurance Contributions Act, the Social Security Act, the Fair Labor Standards Act, and the National Labor Relations Act denies migratory agricultural laborers equal protection of the laws.

STATUTES INVOLVED

The pertinent provisions of Section 3121 and 3306 of the Internal Revenue Code of 1954, 26 U.S.C. 3121 and 3306, Section 209 of the Social Security Act, 42 U.S.C. 409, Sections 6 and 13 of the Fair Labor Standards Act, 29 U.S.C. 206 and 213, and Section 2 of the National Labor Relations Act, 29 U.S.C. 152, are set forth in Appendix A, *infra*, pp. 13–14.

STATEMENT

Petitioners, who are migratory farm workers, filed a complaint in the United States District Court for the Southern District of New York seeking declaratory and injunctive relief against those provisions of the Federal Unemployment Tax Act, the Federal Insurance Contributions Act, the Social Security Act, the Fair Labor Standards Act, and the National Labor Relations Act that cause their exclusion from federal unemployment compensation, old age insurance, and full minimum wage coverage, and from the federally

guaranteed right to bargain collectively.[1] Petitioners claimed that those provisions denied them equal protection of the laws under the Due Process Clause of the Fifth Amendment, and they requested the convention of a three-judge court.

The district court denied petitioners' request for convention of a three-judge court and dismissed their complaint on the ground that the issue they sought to raise had been decided against them in *Romero* v. *Hodgson*, 403 U.S. 901, affirming 319 F. Supp. 1201 (N.D. Calif).[2] The court of appeals affirmed on the same ground.

ARGUMENT

Petitioners here do not directly challenge the holding below on the merits of their constitutional claims. They challenge instead the determination by the district court that those claims are not sufficiently substantial to warrant the convention of a three-judge court. But, as we shall show, their claims were foreclosed by the reasoning underlying *Romero* v. *Hodgson*, *supra*, *Steward Machine Co.* v. *Davis*, 301 U.S. 548, and *Helvering* v. *Davis*, 301 U.S. 619, and therefore were properly treated as insubstantial by the courts below.

1. Petitioners' claim with respect to unemployment compensation coverage is indistinguishable from the

[1] Petitioners also challenged the validity of certain state laws. That challenge does not affect the federal respondents and we do not discuss it further here.

[2] The district court therefore found it unnecessary to reach the question whether petitioners' unemployment compensation and social security claims were barred by the Anti-Injunction Act, 26 U.S.C. 7421.

one considered and rejected in *Romero*, and they make little effort to distinguish it.[3] Petitioners contend instead (Pet. 8–12) that, as a summary affirmance, *Romero* should not be controlling in future litigation; they claim that the decision below, in giving controlling weight to a summary affirmance by this Court, conflicts with *Dillenburg* v. *Kramer*, 469 F. 2d 1222 (C.A. 9), and *Gibson* v. *Berryhill*, 411 U.S. 564.

There is no conflict. In *Dillenburg* the Ninth Circuit did suggest in passing (469 F. 2d at 1225) that a summary affirmance could be given little precedential weight, but that remark was mere *dictum:* the court went on to conclude that the case before it was in any event distinguishable from the summary affirmance relied upon by the appellee there. *Gibson* is actually

[3] Petitioners do suggest two differences, but these have little substance. They contend first (Pet. 12–14) that coupling an unemployment compensation claim with their claims relating to old age insurance, the minimum wage, and collective bargaining, changes the theory of the equal protection argument to one of "a pattern or practice of unequal treatment cutting across the entire spectrum of American social legislation" (Pet. 13). We fail to see how the broadening of equal protection allegations to other statutes can affect the question whether petitioners' exclusion from unemployment compensation coverage itself has a rational basis; each statute must be considered on its own merits. Petitioners also contend (Pet. 14–15) that the traditional rational basis test has been discredited since *Romero*. In fact, however, this Court has recently strongly reaffirmed the principle that economic and tax statutes, such as the ones involved here and in *Romero*, must be sustained when they are shown to have a rational basis. See *San Antonio School District* v. *Rodriguez*, 411 U.S. 1; *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356; *Jefferson* v. *Hackney*, 406 U.S. 535. The standard of review applied in *Romero* is thus also applicable here.

contrary to petitioners' contention: the Court there acknowledged (411 U.S. at 576) that the precedential scope of a summary affirmance was often difficult to measure, but the Court's reasoning strongly implied that a summary affirmance would control subsequent cases involving the same issue. This, of course, is the historic and well-established view. See, *e.g., United States ex rel. Epton* v. *Nenna,* 446 F. 2d 363, 366 (C.A. 2), certiorari denied, 404 U.S. 948. See generally, Note, *Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent,* 52 Boston U.L. Rev. 373 (1972). "Votes to affirm summarily * * * are votes on the merits of a case * * *." *Ohio ex rel. Eaton* v. *Price,* 360 U.S. 246, 247 (memorandum opinion of Mr. Justice Brennan). Petitioners offer no valid reason why such decisions should not be followed by the lower federal courts.

In any event, as we demonstrate below, the rationale of *Romero* and other decisions establishes the insubstantial nature of petitioners' constitutional claims, whether or not *Romero* itself is entitled to controlling precedential weight.

2. Throughout the history of this nation, the special characteristics of agriculture as an industry and as a way of life have led Congress to accord it special legislative treatment. Agriculture has historically been dominated, and remains largely characterized, by small family farms. Moreover, it is uniquely vulnerable: producers are dependent upon the vagaries of weather, soil condition, crop disease, and insect plague, and

they must sell in a competitive market the movements of which they cannot predict, let alone control. Yet the continued prosperity of the farming industry is vital to the well-being of the nation as a whole. For these and other reasons, Congress and the state legislatures have treated agriculture differently from other industries: a catalogue of farm legislation, or of general legislation excluding the world of the farm from its operation, would embrace a substantial portion of the nation's legislative history. See, *e.g.*, *Aero Transit Co.* v. *Georgia Commission*, 295 U.S. 285, 290–293; *American Sugar Refining Co.* v. *Louisiana*, 179 U.S. 89.

The agricultural labor market also possesses special characteristics that distinguish it from the industrial labor market. Farm work tends to be predominantly seasonal and irregular. Substantial segments of the farm labor force are migrant, casual, intermittent, or part-time. The terms and conditions of employment, for obvious reasons, necessarily vary greatly from those prevailing in industry and commerce.

a. In view of these general considerations, the reasons for excluding agricultural labor generally from the federal unemployment compensation program (see 26 U.S.C. 3306(c)(1))[4] are apparent. That exclusion accomplishes two related congressional objectives.

[4] As a technical matter, federal law does not exclude agricultural workers from unemployment compensation coverage; it merely exempts their employers from the federal unemployment tax. The structure of the tax therefore provides no incentive for inclusion of farm workers in state unemployment compensation programs, and most states exclude such workers from coverage.

First, it provides some tax relief for farmers and saves them from the elaborate paperwork requirements that compliance with the federal unemployment tax would entail; in this sense, the exclusion is an indirect subsidy to the farming industry and this Court has upheld a similar exclusion under state law on that ground. *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 512–513. Second, the exclusion of intermittent or seasonal employees is necessary to ensure the fiscal stability of an unemployment compensation program; extending coverage to such workers might result in heavy drains on unemployment insurance funds. See Hearings before the House Committee on Ways and Means on the Economic Security Act, 74th Cong., 1st Sess., pp. 35–36. Cf. *Dandridge* v. *Williams*, 397 U.S. 471, 477–480. Such considerations long ago led this Court to uphold, as having a rational basis, the very exclusion petitioners now challenge. *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 583–585. This Court's decision in *Romero* merely reaffirmed the vitality of *Steward Machine*.

But the needs of farm laborers are still very much before the Congress. In March of this year, acting pursuant to Section 141 of the Employment Security Amendments of 1970, Pub. L. 91–373, 84 Stat. 695, 705, the Secretary of Labor issued to Congress a report concluding that the extension of unemployment compensation coverage to farm workers is now economically feasible. See Appendix B, *infra*, pp. 15–17. A bill, H.R. 8600, 93d Cong., 1st Sess., has now been introduced, with Administration support, to provide unemployment in-

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surance for all farm laborers who work for employers paying more than $5,000 in annual cash remuneration or employing at least four employees for at least one day in each of 20 weeks per year.

The carefully drawn provisions of this bill take into account the complex economic effects that its passage would have on agricultural employers and the fiscal stability of unemployment insurance funds. Change in this area should properly come as a result of such refined legislation and not from the broad-brush judicial intervention sought by petitioners. In the meantime, the present law remains constitutionally valid: Congress has not exceeded its powers by placing agricultural labor in a separate category with regard to the unemployment tax and then seeking—and giving deliberate consideration to—added information and analysis before taking further action.

b. Similar considerations support the validity of the other federal laws challenged by petitioners.

i. As originally enacted, the Social Security Act and the Federal Insurance Contributions Act excluded all farm workers from the benefits—and costs—of old age insurance. This exclusion was upheld as valid in *Helvering* v. *Davis,* 301 U.S. 619, 635, 646.[5] Like the similar exclusion from the unemployment tax, exclusion of farmers from the social security tax protected their precarious economic position and saved them from having to comply with extensive bookkeeping require-

[5] The respondent there had argued that "[i]t is capricious to deny the over sixty-five benefits to farm laborers and to relieve their employers from an imposition placed on other employers." Resp. Br. 41, *Helvering* v. *Davis*, No. 910, October Term 1936.

ments; the Court in fact decided this question in *Helvering* v. *Davis* merely by referring to *Steward Machine.*

But as the conditions in the agriculture industry have changed, Congress has subjected the agricultural labor exclusion to close and continuing scrutiny. The result has been a steady narrowing of that exclusion, undertaken with due regard to the paperwork and financial burdens thereby imposed on the farmers themselves.[6] At present, old age insurance coverage extends to all agricultural workers who are paid more than $150 per year by a single employer or are employed by a single employer for more than 20 days. 26 U.S.C. 3121(a)(8); 42 U.S.C. 409 (h). This evolution of the old age insurance program demonstrates that Congress, in cautiously evaluating the administrative and economic costs of expanded coverage and weighing them against the legitimate needs of farm workers, has continued responsibly to balance the respective interests in the manner approved by this Court in *Steward Machine* and *Helvering* v. *Davis.*

ii. Agricultural labor was denied the federally protected right to bargain collectively (see 29 U.S.C. 152 (3)) for several valid reasons: many family farms employ small numbers of workers except in peak work periods, and the extension of collective bargaining to such farms would be seriously burdensome to the farmers; the intermittent, part-time, seasonal, and cas-

[6] See, *e.g.*, S. Rep. No. 1669, 81st Cong., 2d Sess., pp. 2, 10–13; H. Rep. No. 1698, 83d Cong., 2d Sess., pp. 1–4, 9–10; S. Rep. No. 1987, 83d Cong., 2d Sess., pp. 1–2, 7–8; S. Rep. No. 2133, 84th Cong., 2d Sess., pp. 1–2, 11–12.

ual nature of so much agricultural labor, and the small size of most agricultural employers, would complicate the administration of collective bargaining in that industry. See 79 Cong. Rec. 9720–9721; S. Rep. No. 573, 74th Cong., 1st Sess., p. 7. The relevant considerations are similar to those pertaining to the unemployment and old age insurance taxes. See generally Morris, *Agricultural Labor and National Labor Legislation,* 54 Calif. L. Rev. 1939, 1945–1956 (1966); Comment, *Legislation and Agriculture Labor,* 1949 Wis. L. Rev. 563, 570–571. Cf. *National Labor Relations Board* v. *Edward G. Budd Mfg. Co.,* 169 F. 2d 571, 578 (C.A. 6), certiorari denied *sub nom, Foreman's Assn. of America* v. *Edward G. Budd Mfg. Co.,* 335 U.S. 908.

iii. The Fair Labor Standards Act, which excludes many classes of employees from any minimum wage coverage (see 29 U.S.C. 213(a)), provides limited coverage for farm laborers: only workers on farms employing more than 500 man-days of agricultural labor during any calendar quarter of the preceding year are granted minimum wage protection,[7] and the minimum wage schedule for such agricultural workers is lower than for laborers in most industries. 29 U.S.C. 206(a)(5) and 213(a)(6). The purpose of the restriction of the Act's requirements to larger farming employers is obvious—to maintain the economic viability of the family farm, and to avoid the administrative difficulties inherent in policing compliance by such small farms. The lower minimum wage schedule results from

[7] Presumably this provision grants greater protection to migratory agricultural workers, such as petitioners, who may typically work on larger farms, than to other agricultural workers.

legislative concern for the broader economic needs of the entire farming industry. See *Florida Fruit & Produce* v. *United States*, 117 F. 2d 506, 508 (C.A. 5). In short, similar considerations pertain to all the statutes attacked by petitioners. See Comment, 1949 Wis. L. Rev., *supra*, at 572–574.

Congress has attempted over the years to extend the statutory benefits to the maximum extent economically feasible, and has provided coverage for employees of large "agribusiness enterprises" whose situation most closely parallels that of industrial firms. See S. Rep. No. 1487, 89th Cong., 2d Sess., pp. 2–4, 9–10. This measured and deliberate congressional extension of social welfare legislation to agricultural workers is slower than petitioners would like, but the statutory pattern so far evolved by Congress cannot be said to lack rationality. This conclusion is so clear that consideration by a three-judge court was unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1973.

APPENDIX A

Sections 3121 and 3306 of the Internal Revenue Code of 1954, 26 U.S.C. 3121 and 3306, provide in pertinent part as follows:

> Section 3121(a). For purposes of [the old age and survivors insurance tax], the term "wages" means all remuneration for employment * * * except that such term shall not include— * * *
>
> (8)(A) remuneration paid in any medium other than cash for agricultural labor; (B) cash remuneration paid by an employer in any calendar year to an employee for agricultural labor unless (i) the cash remuneration paid in such year by the employer to the employee for such labor is $150 or more, or (ii) the employee performs agricultural labor for the employer on 20 days or more during such year for cash remuneration computed on a time basis; * * *.
>
> Section 3306(c). For purposes of [the federal unemployment tax], the term "employment" means any service performed * * * except—
>
> (1) agricultural labor * * *.

* * * * *

Section 209 of the Social Security Act, 42 U.S.C. 409, provides in pertinent part as follows:

> For the purposes of [the old age and survivors insurance program], the term "wages" means remuneration * * * except that, * * * such term shall not include— * * *
>
> (h)(1) Remuneration paid in any medium other than cash for agricultural labor;
>
> (2) Cash remuneration paid by an employer in any calendar year to an employee for agricultural labor unless (A) the cash remuneration

paid in such year by the employer to the employee for such labor is $150 or more, or (B) the employee performs agricultural labor for the employer on 20 days or more during such year for cash remuneration computed on a time basis; * * *.

* * * * *

Sections 6 and 13 of the Fair Labor Standards Act, 29 U.S.C. 206 and 213, provide in pertinent part as follows:

Section 6(a). Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than * * * $1.60 an hour * * *, except as otherwise provided in this section; * * *

(5) if such employee is employed in agriculture, not less than * * * $1.30 an hour * * *.

Section 13(a). The provisions of [Section 6] * * * shall not apply with respect to— * * *

(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor * * *.

* * * * * * *

Section 2 of the National Labor Relations Act, 29 U.S.C. 152, provides in pertinent part as follows:

When used in this Act— * * *

(3) the term "employee" * * * shall not include any individual employed as an agricultural laborer * * *.

APPENDIX B

U.S. DEPARTMENT OF LABOR,
OFFICE OF THE SECRETARY,
Washington, D.C., March 15, 1973.

Hon. CARL ALBERT,
Speaker of the House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: I am transmitting herewith the results of this Department's study of the effect and impact of extending unemployment insurance coverage to agricultural labor. The study was undertaken pursuant to the express direction in section 906(a)(2) added to the Social Security Act by the Employment Security Amendments of 1970 (P.L. 91-373).

The study, conducted under the supervision of the Manpower Administration's Unemployment Insurance Service, is the largest of its kind ever conducted. With the cooperation of 12 land-grant colleges and State employment security agencies, the study spans 18 States and about 50 percent of the Nation's hired farm work force. For 15 States, the study was done primarily by a research consortium of agricultural economists in the land-grant colleges; the results for those States are summarized in one volume. In the other three States, the studies were conducted by the State employment security agencies, and each such agency has issued its own report. (A listing of the participating land-grant colleges is enclosed.)

Based on the study we estimate that extension of the unemployment insurance laws to large farm employers (those with four workers in 20 weeks or a

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quarterly payroll of $5,000) in 1969 would have added about 55,000 employers and 770,000 farm jobs nationwide.

The study results demonstrate that: (1) relatively few large farm employers account for a substantial portion of the farm work force, (2) the costs of providing unemployment insurance protection to farm workers are not prohibitive either to farm employers or to the UI system as a whole. In most States the agricultural sector would be self-supporting, that is, contributions from farm employers would, on the average, be sufficient to cover the benefits paid to involuntarily unemployed farm workers, and (3) employers currently subject to the UI tax would be insignificantly affected in 16 of the 18 States studied, and not greatly affected in California and Florida with respect to increased taxes. In California, benefit costs as a percent of taxable wages would increase from 1.96 percent to 2.15 percent; in Florida, from .43 percent to .55 percent.

The package transmitted includes, for each member of the House, a copy of the summary report on the 15 States and the separate reports for California, Minnesota and Washington.

Sincerely,

PETER J. BRENNAN,
Secretary of Labor.

Enclosures.

A Listing of the Land-Grant Colleges:

University of Connecticut.
University of Delaware.
University of Florida.
University of Maryland.
University of Massachusetts.
University of New Hampshire.
Rutgers—The State University (New Jersey).
Economic Research Service, U.S.D.A., Cornell University (New York).
Ohio State University.
The Pennsylvania State University.
Texas A&M University.
University of Vermont.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-295

JANE DOE, *et al.*,

Petitioners,

against

PETER BRENNAN, SECRETARY OF LABOR, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR STATE RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-295

JANE DOE, *et al.*,

Petitioners,

against

PETER BRENNAN, SECRETARY OF LABOR, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR STATE RESPONDENTS IN OPPOSITION

The State respondents oppose the petition for a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit, dated May 1, 1973. That decision affirmed the opinion and order of the United States District Court for the Southern District of New York, dated June 7, 1972, refusing petitioners' application to convene a three-judge court and dismissing the Complaint for want of a substantial federal question.

Opinions Below

The opinion of the Court of Appeals is reported at 478 F. 2d 537 and reproduced in the Appendix to the Petition at pp. 1a-7a. The opinion and order of the District Court are reported at 344 F. Supp. 964 and reproduced in the Appendix to the Petition at pp. 8a-14a.

Jurisdiction

The petitioners rely on 28 U.S.C. § 1254(1) in support of the jurisdiction of this Court.

Questions Presented

1. Whether the lower courts correctly found that petitioners' constitutional claims were insubstantial in light of this Court's summary affirmance in *Romero* v. *Hodgson*, 403 U.S. 901 (1971)?

2. Whether recent decisions of this Court require that *Romero* v. *Hodgson, supra,* be re-examined?

State Statutes Involved

Petitioners have placed the following state statutes in issue: New York Unemployment Insurance Act, N.Y. Labor Law § 511(6)(a); New York Minimum Wage Act, N.Y. Labor Law §§ 651(5)(b), 671(6) and 673; New York Workmen's Compensation Law § 201(6)(A); and the New York "Little Wagner Act", N.Y. Labor Law § 701(3). These provisions are set forth in the Appendix to this Brief together with N.Y. Labor Law §§ 511(1), 671(1), (2) and N.Y. Workmen's Compensation Law §§ 2(4), 3(1) and group 14-b.

Statement of the Case

This action was commenced in May of 1972 by nine migrant agricultural laborers who are alleged to work in the Eastern "migrant stream".* Their relationship with the State of New York is alleged to be their annual participation in the harvest of the apple crop in upstate Ulster County from August through October (Compl't ¶¶ "2(a)"-"2(i)"). They have proceeded under fictitious names and on behalf of themselves and others similarly situated.**

The Complaint consists of six causes of action. Five challenge separate federal and state ameliorative legislative plans. Of these claims, three (the First, Fourth and Fifth Causes of Action) proceed on the theory that the failure to include migrant agricultural laborers within the protections of the legislation both improperly distinguishes between agriculture and other forms of labor and perpetuates racial classifications in violation of petitioners' Fifth and Fourteenth Amendment rights.***

---

* The Complaint defines the Eastern "migrant stream" as an "agricultural belt extending from Northern Florida, through Virginia, North Carolina and Maryland, to New Jersey and New York" (Compl't ¶ "4").

** Both the federal and state respondents argued below that the failure to disclose the identity of any of the plaintiffs at the commencement of the action made the Complaint a nullity. *Roe* v. *State of New York*, 49 F.R.D. 279 (S.D.N.Y. 1970). This ground for dismissal was not reached by the District Court (Petitioners' Appendix, p. 14a n. 7) or the Court of Appeals (Petitioners' Appendix, pp. 3a-4a and n. 3).

*** The First Cause of action challenges the omission of agricultural laborers from federal and state unemployment insurance plans, 26 U.S.C. § 3306(c)(1), (k) and N.Y. Labor Law § 511(6)(a) (Compl't ¶¶ "8"-"11"). The fourth Cause of Action challenges the alleged exclusion of agricultural laborers from the State workmen's compensation plan, N.Y. Workmen's Compensation Law

(footnote continued on following page)

Two claims (the Second and Third Causes of Action argue that the limited minimum wage and social security protection afforded migrant agricultural laborers as distinguished from other forms of labor violates petitioners' rights under the Fifth and Fourteenth Amendments.*

The Sixth and concluding Cause of action alleges that the "cumulative effect" of the enumerated legislative plans on migrant agricultural labor is "blatantly violative" of petitioners' fundamental rights and amounts to State imposed peonage in violation of the Fifth, Thirteenth and Fourteenth Amendments (Compl't ¶ "36"). Throughout the litigation, petitioners have placed their principal emphasis on this Cause of Action, repeatedly characterizing the legislation as reflective of a "conscious societal decision" to exclude migrant labor from the "entire spectrum of American social legislation" (e.g., Petition, p. 13).

Contrary to the position taken by the petitioners in their Fourth Cause of Action, New York does not exclude migrant agricultural laborers from coverage under the State's workmen's compensation plan. Since 1967, employer-farmers have been obliged to participate in the mandatory program if they paid cash remuneration for farm labor aggregating more than $1,200 in the preceding calendar year.

(footnote continued from preceding page)

§ 201(6)(A) (Compl't ¶¶ "25"-"27"). The Fifth Cause of Action is directed against the National Labor Relations Act §§ 7 and 8(a), 29 U.S.C. §§ 157, 158(a) if construed as inapplicable to concerted activities by agricultural laborers and against the agricultural exemption of the State Labor Relations Act, N.Y. Labor Law § 701 (Compl't ¶¶ "28"-"35").

* The Second Cause of Action challenges the minimum wage provision for agricultural laborers set by the Fair Labor Standards Act, 29 U.S.C. § 213(a)(5), (6), and the State Minimum Wage Standards for Farm Workers, N.Y. Labor Law, Art. 19-A (Compl't ¶¶ "12"-"21"). The Third Cause of Action challenges the qualification requirements for agricultural laborers under the Social Security Act, 42 U.S.C. § 409(h)(2) (Compl't ¶¶ "22"-"24").

N.Y. Workmen's Compensation Law § 3, subd. 1, group 14-b, added by c. 646 of the Laws of 1966.

Section 201(6)A of the Workmen's Compensation Law, upon which petitioners rely, refers exclusively to the State's Disability Benefits Law. This law was adopted in 1949 (c. 600 of the Laws of 1949) as a private, contributory insurance program intended to provide benefits to employees for "sickness and disability *not incurred in their employment*". (Emphasis added.) *Matter of Knapp* v. *Syracuse University*, 308 N.Y. 274, 278 (1955) (citing Governor Dewey's memorandum of approval). The program has continued down to date without tax support. Individual employees contribute up to $0.30 weekly; employers contribute the balance. The program is administered by the Workmen's Compensation Board and its staff.

In 1969, New York extended minimum wage protection to agricultural workers. N.Y. Labor Law Art. 19-A added by c. 552 of 1969. The minimum wage was established at $1.40 per hour, effective October 1, 1969 and at $1.50, effective February 1, 1971 N.Y. Labor Law § 673.* It is applicable to all employers who meet the $1,200 payroll standard, N.Y. Labor Law § 672. The legislation contains extensive provisions for monitoring the wage rate and investigating and regulating conditions of agricultural labor. N.Y. Labor Law § 674, *et seq.*

The Industrial Commissioner has promulgated specific protective regulations concerning piece-work rates and fees for food and lodging, two areas which the petitioners consider as unregulated sources of abuse by employers and farm labor contractors (Complt. ¶¶ "6", "16", "21" and

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* "Hours worked" includes "time spent on a single farm in going from one field to another, or in waiting for baskets, pickup or for similar purposes." • • • [T]ime not worked because of weather conditions is excluded. N.Y. Labor Law § 674. See also 12 N.Y.C.R.R. § 190-39..

Petition, p. 6). Piece work rates are deemed to comply with the minimum wage only if they yield "not less than the basic minimum hourly rate to 80 percent of the total number of piece rate employees engaged in the same kind of work, for the same employer * * * provided that the average hourly earnings of all such employees is not less than the basic minimum hourly rate". 12 N.Y.C.R.R. § 190-3.1. Allowances, including food and lodging may be considered as part of the minimum wage subject to limitations on valuation and quality.* N.Y. Labor Law § 671 subd. 5. A meal may not be valued at more than 55¢; rooms may not be valued at more than 65¢ daily; and houses and apartments may not be valued at more than $1.30 per person or $2.60 per unit for multiple occupancy, or at more than the fair rental value. 12 N.Y.C.R.R. § 190-2.2. Meals must be nutritious and include portions of fruits or vegetables, proteins and grains or starch. 12 N.Y.C.R.R. § 190-4.7. Lodgings must meet generally accepted standards for protection against fire and all applicable state and local laws, codes, regulations and ordinances. 12 N.Y.C.R.R. § 190-4.8.

The New York State Unemployment Insurance Law is not applicable to agricultural workers, golf caddies and baby sitters, among other categories of labor. N. Y. Labor Law § 511, subds. 6(a), 8 and 12. The New York State Labor Relations Act is not applicable to agricultural workers and domestics, among other categories of labor. N. Y. Labor Law § 701, subd. 3. Petitioners do not allege that New York State or any of its agencies or political subdivisions has taken or threatened to take any action to restrain organizational activity by or on behalf of agricultural workers.

The District Court found petitioners' claims insubstantial in light of this Court's summary affirmance in *Romero*

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* Lodging allowances may not be considered as part of the minimum wage for seasonal agricultural workers. 12 N.Y.C.R.R. § 190-2.2(b).

v. *Hodgson,* 403 U.S. 901 (1971) aff'g 319 F. Supp. 1201 (N.D. Calif. 1970) and dismissed the complaint *sua sponte.* The Court of Appeals for the Second Circuit affirmed. Both courts rejected petitioners' efforts to distinguish *Romero* on the grounds that the case at bar involved the cumulative effect of several statutory plans; that the varied pattern of protection of migrant workers resulted in discrimination against minorities; and that, for either or both reasons, a strict equal protection test was applicable (Petitioners' Appendix, pp. 12a-14a, 6a-7a).

ARGUMENT

1. The lower courts properly afforded controlling effect to this Court's summary affirmance in *Romero* v. *Hodgson,* 403 U.S. 901 (1971).

Less than one and one-half years ago this Court affirmed the district court's order of dismissal in *Romero* v. *Hodgson,* 403 U.S. 901 (1971) aff'g 319 F. Supp. 1201 (N.D. Calif. 1970). *Romero* rejected an equal protection challenge to federal and state unemployment compensation plans which excluded agricultural workers relying on this Court's decisions in *Carmichael* v. *Southern Coal Co.,* 301 U.S. 495 (1937); *Steward Machine Co.* v. *Davis,* 301 U.S. 548 (1937); *Helvering* v. *Davis,* 301 U.S. 619 (1937). The principal issue in the case at bar is identical with that decided in *Romero.**

It is well-settled that summary affirmances by this Court are decisions on the merits and thus properly considered as precedents. *Ohio ex rel. Eaton* v. *Price,* 360 U.S. 246, 247 (1959); *United States ex rel. Epton* v. *Nenna,*

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* In 1970, the Fifth Circuit found that a challenge to the farm labor exclusion of the National Labor Relations Act substantial enough to require hearing by a three-judge court. *Local Union No. 300* v. *McCulloch,* 428 F. 2d 396 (5th Cir. 1970). However, this decision became "obsolete" following *Romero* (Petitioners' Appendix, p. 12 n. 4).

446 F. 2d 363, 366 (2d Cir. 1971) cert. den. 404 U.S. 948 (1971); *Heaney* v. *Allen,* 299 F. Supp. 1300; 1300, 1302 n. 1 (E.D.N.Y. 1969) aff'd 425 F. 2d 869 (2d Cir. 1969); Stern and Gressman, Supreme Court Practice 197 (4th ed. 1969). Only denials of certiorari and affirmances by an equally divided court are without precedential value. *Brown* v. *Allen,* 344 U.S. 443 (1953); *Atlantic Coast Line R. Co.* v. *Powe,* 283 U.S. 401 (1931); *Neil* v. *Biggers,* —— U.S. ——, 41 U.S.L.W. 4064 (12/6/72); *United States ex rel. Radich* v. *Criminal Court,* 459 F.2d 745 (2d Cir. 1972) cert. den. sub. nom. *Ross* v. *Radich,* —— U.S. ——, 41 U.S.L.W. 3376 (1/9/73).

There is no genuine conflict on these principles among circuits which would warrant plenary consideration by the Court. See Petition, pp. 8-9. In *Dillenberg* v. *Kramer,* 469 F. 2d 1222 (9th Cir. 1972), the Ninth Circuit found an equal protection challenge to state constitutional and statutory provisions denying voting rights to unpardoned felons was sufficient to warrant consideration by a three-judge court. The state officials' argument that the issue had been previously decided by this Court's summary affirmance in *Beacham* v. *Braterman,* 396 U.S. 12 (1969), aff'g 330 F. Supp. 182 (S.D. Fla. 1969) and by *Green* v. *Board of Elections of the City of New York,* 380 F. 2d 445 (2d Cir., 1967), cert. den. 389 U.S. 1048 (1967), was rejected. In reaching this result, the Court of Appeals first expressed its view that summary affirmances should be accorded "little precedential significance," but then proceeded to rely on the alternative proposition that regardless of the "weight" of *Beacham* and *Green* as precedents, they were not controlling because of subsequent developments in the voting rights area. 381 F. Supp. 1225-1226. Cf. *Dunn* v. *Blumstein,* 405 U.S. 330 (1972). See also *Serrano* v. *Priest,* 487 P. 2d 1241, 1264-1266 (Cal. Sup. Ct. 1971), following the same form of argument.

Gibson v. *Berryhill,* —— U.S. ——, 36 L.Ed. 2d 488 (May 7, 1973), does not support the petitioners' view that sum-

mary affirmances are not to be afforded controlling significance. In that case, Mr. Justice White, speaking for the majority, was confronted with the problem of determining whether the Court's summary affirmance in *Geiger* v. *Jenkins*, 401 U.S. 985 (1971), was controlling. His reference at the outset of his discussion to summary affirmances as "somewhat opaque", 36 L.Ed. 2d at 498, does not pertain to their quality as precedents but simply refers to the fact in the absence of a full opinion it is difficult to determine the basis of a given decision and thus its appropriate application as precedent. Justice White resolved this difficulty by analyzing the facts and issues in *Geiger* as presented in the record of the case and comparing them with those presented in *Gibson*. The same analytical procedure was followed herein with respect to the *Romero* affirmance. Both lower courts found that the principal unemployment compensation issue presented in the case at bar had been presented and decided in *Romero*. The district court noted that petitioners' claim that the agricultural exclusion now had a discriminatory effect because of an alleged change in the racial make-up of the working force had also been presented and decided in *Romero* (Petitioners' Appendix, p. 13a).

Petitioners urge the alternative position that even if *Romero* is afforded precedential significance, it is not controlling because different or broader claims are raised herein (Petition, pp. 12-14). The argument rests on the theory that the first five Causes of Action of the Complaint may be combined, characterized as a "systematic exclusion of migrant agricultural laborers from a broad range of social legislation" and then contrasted with *Romero* which challenged only a "single agricultural exclusion" (Petition. p. 13). The argument is both legally unsound and factually inaccurate.

The legal aspect of the argument erroneously assumes that two or more legislative programs each valid if con-

sidered separately may be considered anew and invalidated if challenged in the same complaint. Thus, petitioners would argue that if the agricultural exemption in the unemployment insurance program sustained in *Romero, Carmichael* and *Steward Machine Co.* were challenged in the same action with the agricultural exemption in the social security program as sustained in *Helvering* v. *Davis,* 301 U.S. 619, 646 (1936), a new question would be presented and a different judicial result obtain. The district court rejected this approach, stating:

> "[T]he court perceives it no sound basis for reconsidering . . . a recent decision of the Supreme Court following the thus far settled course of judging statutes singly, with an eye to their distinct rationales and asserted justifications, for purposes of constitutional tests." (Petitioners' Appendix, p. 13a)

The Court of Appeals was of the same view:

> "[W]e cannot in good conscience hold that . . . the presence of four federal statutes under attack instead of one . . . justifies our disregarding *Romero.*" (Petitioners' Appendix, p. 7a).

With respect to the particular state legislation in issue, we have already noted that there is no "systematic exclusion" as petitioners allege. See pp. 4-6, *ante.* Both workmen's compensation and minimum wage protection have been extended to agricultural workers. N.Y. Workmen's Compensation Law § 3 subd. 1, group, 14-b; N.Y. Labor Law Art. 19-A.

After careful study, New York adopted a $1,200 payroll standard for both programs and, as of now $1.50 minimum wage. As is apparent, the legislation is not limited to "agribusiness" but includes many small farm operations. However, in providing this extensive coverage, the Legislature continued to recognize the special problems of farming

enterprises which have traditionally supported differences in statutory protections afforded industrial workers as distinguished from agricultural workers. In its "Statement of Public Policy" in support of the Minimum Wage Standards for Farm Workers, the Legislature stated in part (N.Y. Labor Law § 670):

> "The legislature hereby finds that the establishment of minimum wage standards for farm laborers involves distinct and unusual problems; that the agricultural labor force is made up of regular all-year workers as well as short-term seasonal workers; that although some workers are paid on an hourly basis, many are paid on a piecework, weekly, monthly, or other basis; and that the agricultural industry is particularly affected by weather and market conditions and by perishability of products. Accordingly, the legislature further declares that it is the purpose of this act to provide a flexible approach with full consideration of the unusual problems involved."

Accord, *Carmichael* v. *Southern Coal Co., supra* at 512-513; *Steward Machine Co.* v. *Davis, supra* at 583-585; *Helvering* v. *Davis, supra* at 646; *Romero* v. *Hodgson,* 319 F. Supp. *supra* at 1202-1203.

The only state legislative plans in issue which in fact exclude agricultural workers are the unemployment insurance program [N.Y. Labor Law § 511(a)(b)] and the "Little Wagner" Act [N.Y. Labor Law § 701(3)]. As noted the exclusion in the former program was specifically considered in *Romero, Carmichael* and *Steward Machine Co.* together with the special problems occasioned by protective legislation for farming enterprises. Labor relations problems were considered in *National Labor Relations Board* v. *Edward G. Budd Mfg. Co.,* 169 F. 2d 571 (6th Cir. 1948) cert. den. sub nom. *Foreman's Assn. of America* v. *Edward G. Budd Mfg. Co.,* 335 U.S. 908 (1949).

While either or both those programs may soon extend their coverage to certain agricultural workers (e.g. Brief of Federal Respondents, Appendix B), it is apparent that such action is peculiarly within the province of the Congress and state legislatures and that neither body is obliged to provide complete solutions to the problems of the migrant worker. *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802, 809 (1969). It is only in those forums that the economic and administrative viability of such legislation can be appropriately studied and the competing interests of the farm employer and worker adjusted. As this Court has long recognized, Congress, in providing for three-judge courts, did not intend to authorize the examination of legislative judgments on the practicability and timeliness of social change. *Phillips* v. *United States,* 312 U.S. 246, 251 (1941).

2. Recent decisions of this Court do not provide any basis for reconsidering *Romero* v. *Hodgson, supra.*

Petitioners urge that recent developments in the law of equal protection require that *Romero* be re-examined. They argue in substance that the Court should adopt a new equal protection test falling somewhere between "compelling state interest" and "reasonable relationship" to a legitimate state interest (Petition, pp. 14-15). Alternatively, they argue that if the two-tier standard is retained, the more relaxed "reasonable relation" test applied in *Romero* is inappropriate to the case at bar (Petitioners' Appendix, pp. 6a-7a).

The Court has repeatedly acknowledged the appropriateness of the traditional "reasonable relation" test to equal protection challenges against economic and social legislation. *San Antonio Independent School District* v. *Rodriguez,* —— U.S. ——, 36 L.Ed. 2d 16 (1973); *Jefferson* v. *Hackney,* 406 U.S. 535 (1972); *Richardson* v. *Belcher,* 404 U.S. 78 (1971); *Dandridge* v. *Williams,* 397 U.S. 471 (1970).

Any doubt about the application of the test when important governmental benefits are in issue was resolved in *San Antonio, supra.* There the Court ruled that the social importance of a service performed by the state was not the criterion of the compelling state interest test, but only whether the right involved was "explicitly or implicitly guaranteed by the Constitution." 36 L.Ed. 2d *supra* at 43.

Unemployment insurance and similar ameliorative programs are neither "explicit" nor "implicit" constitutional guarantees, and accordingly cannot be characterized as "fundamental rights" for equal protection purposes regardless of how many programs are considered in a single complaint (Petitioners' Appendix, pp. 7a, 12a-13a). Similarly the allegation of racially discriminatory effect, already considered in *Romero,* is insufficient to warrant consideration of the legislation in issue as "suspect classifications" (Petitioners' Appendix, p. 14a).

To the extent that commentators and the lower courts have considered a third equal protection test, this Court has not followed suit. Notably, in commenting on this point below, the Court of Appeals cited cases decided in the Second Circuit prior to *San Antonio, supra,* wherein this Court continued its adherence to the two-tier standard (Petitioners' Appendix, p. 7a).

Reference to *Goosby* v. *Osser,* 409 U.S. 512 (1973), does not assist petitioners. As the courts below properly found, the relevant issues had been rendered insubstantial by prior decisions of this Court. With respect to the alleged additional claim that petitioners' right to travel was infringed by the challenged legislation, the District Court stated (Petitioners' Appendix, p. 13a): "Apart from the fact that the new argument does not appear to be a powerful one, the rendering of such additional points does not warrant re-examination by a District Court of a precedent that is squarely controlling in terms of its result." The

state respondents submit that District Court's disposition of the right to travel claim is consistent with a finding of insubstantiality under *Goosby, supra,* at 518-519. Moreover, even brief examination of the claim shows it to be frivolous. Far from having their freedom of travel limited by the State of New York, petitioners in fact enter the State annually to earn portions of their livelihood at destinations of their choice. That legislative programs may vary from state to state does not give rise to a right to travel claim. A contrary view would render the Tenth Amendment meaningless.

CONCLUSION

The petition for a writ of certiorari should be denied.

November 26, 1973.

Respectfully submitted,

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APPENDIX

The New York Unemployment Insurance Act states in pertinent part:

N. Y. Labor Law § 511. *Employment*

1. General definition. "Employment" means any service under any contract of employment for hire, express or implied, written or oral.

* * *

6. Agricultural labor. (a) The term "employment" does not include agricultural labor.

The New York Minimum Wage Act states in pertinent part:

N. Y. Labor Law § 651. *Definitions*

* * *

5. "Employee" includes any individual employed or permitted to work by an employer in any occupation, but shall not include any individual who is employed or permitted to work: (a) in service as a part time baby sitter in the home of the employer; or someone who lives in the home of the employer for the purpose of serving as companion to a sick, convalescing or elderly person, and whose principal duties do not include housekeeping; (b) *in labor on a farm;* (c) in a bona fide executive, administrative or professional capacity; etc. * * * (Emphasis added.)

The New York Minimum Wage Standards for Farm Workers states in pertinent part:

N. Y. Labor Law § 671. *Definitions*

As used in this Article [19-A]:

1. "Farm" includes stock, dairy, poultry, fur bearing animal, fruit and truck farms, plantations, or-

chards, nurseries, greenhouses, or other similar structures, used primarily for the raising of agricultural or horticultural commodities.

2. "Employee" includes any individual employed or permitted to work on a farm but shall not include: (a) domestic service in the home of the employer; (b) the parent, spouse, child or other member of the employer's immediate family; etc. * * *

* * *

6. "Hours worked" means the time that a farm worker is permitted to work in the fields or at his assigned place of work, and shall include time spent on a single farm in going from one field to another, or in waiting for baskets; pick up, or for similar purposes; provided, however, that time not worked because of weather conditions shall not be considered as hours worked.

§ 673. *Minimum Wage*

Every employer shall pay to each of his employees a wage of not less than:

$1.40 on and after October 1, 1969

$1.50 on and after February 1, 1971

for each hour worked, or such other wage as may be established in accordance with the provisions of this article.

The New York Labor Relations ("Little Wagner") Act states in pertinent part:

N. Y. Labor Law § 701. *Definitions*

When used in this article [20]:

* * *

3. The term "employees" includes but is not restricted to any individual employed by a labor organi-

zation; any individual whose employment has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment; * * * but shall not include any individual employed by his parent or spouse or in the domestic service of any person in his home, or any individuals employed only for the duration of a labor dispute, or *any individuals employed as farm laborers*, etc. * * * (Emphasis added.)

The New York Disability Benefits Law states in pertinent part:

N. Y. Workmen's Compensation Law § 201. *Definitions*
As used in this Article [9]

* * *

6. A. "Employment" means employment in any trade, business or profession except that the following shall not be deemed employment under this article: services performed for the state, a municipal corporation, local government agency, other political subdivision or public authority; * * * *service farm laborers;* casual employment and the first forty-five days of extra employment as employees not regularly in employment as otherwise defined herein; service as golf caddies; * * * (Emphasis added.)

The New York Workmen's Compensation Law states in pertinent part:

§ 2. *Definitions*

As used in this chapter,

* * *

4. "Employee" means a person engaged in one of the occupations enumerated in section three * * * The term "employee" shall not include . . . the spouse or minor child under the age of eighteen years of

an employer who is a farmer unless the services of such spouse or minor child shall be engaged by said employer under an express contract of hire, nor shall it include farm laborers except as provided in Group Fourteen-b of section three of this chapter. If a farm labor contractor recruits or supplies farm laborers for work on a farm, such farm laborers shall for the purposes of this chapter be deemed employees of the owner or lessee of such farm.

• • •

§ 3. *Application*

1. Hazardous employment compensation shall be payable for injuries or death incurred by employees in the following employments:

• • •

Group 14-b. Employment as a farm laborer as provided herein. A farmer shall provide coverage under this chapter for all farm laborers employed during any part of the twelve consecutive months beginning April first of any calendar year preceded by a calendar year in which cash remuneration paid to all farm laborers aggregated twelve hundred dollars or more.

CERTIORARI DENIED